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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 362.

THE HIRSCH IMPROVEMENT COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. The case of *Brown* v. *Helvering*, 291 U. S. 193, 199, cited in the respondent's brief at page 9, is one in which the taxpayer had an *absolute* right to earnings as distinguished from the security in the instant case, in which the petitioner had no absolute right. There was no question that the premuim in the *Brown* case became the absolute property of the taxpayer when received, and consequently, the commissions were income at that time. In the instant case, The Hirsch Improvement Company's right to the $35,000.00 security fund was contingent upon its eventual application as rent, but it did not receive the fund as rent or *earnings*.

The distinction between the *Astor Holding Co.* case, 135 F (2d) 47 (C. C. A., 5) (cited at p. 9 of the respt's br.), and the instant case has been set forth in the petitioner's brief (p. 19).

The advance rental in the instant case was the $25,000.00 which the petitioner has conceded as taxable income in year 1936. A clear distinction is indicated between the said $25,000.00 and the $35,000.00 fund in question. The latter, by the terms of the lease, was described as *security* (R. 146), and was so received by the petitioner.

2. In the light of this Court's decision in *United States* v. *Emery, Bird, Thayer Realty Company,* 237 U. S. 28, the cases cited at page 12 of the respondent's brief are not applicable to the facts in the instant case on the "doing business" question.

In *Edwards* v. *Chile Copper Co.,* 270 U. S. 452 (respt's br., p. 12), the taxpayer was furnishing funds to the Exploration Company, from time to time to assist said company in its work. The taxpayer was actively seeking new profit.

In *Magruder* v. *Washington, B. & A. Realty Corp.,* 316 U. S. 69 (respt's br., p. 12), the taxpayer was selling property and engaging in other activities, and in the language of this Court, "did not fall into that state of quietude, covered by the specific language of Article 43 (b) (2), [pet's br., p. 5], in which it was merely owning and holding specific property and distributing the resulting proceeds."

In the instant case the petitioner's organization and activities specifically fall within the provisions of the Commissioner's regulations,—Article 43 (b) (2) *supra.* (See also, *Harrisburg Hotel Company* v. *U. S.,* C. C. A., 3, No. 8557, August 28, 1944, reported in Prentice Hall 1944 Federal Tax Service, Paragraph 62,708.)

CONCLUSION.

The petitioner respectfully urges that the questions here presented are of material importance and warrant review of the decision of the Court below, particularly in view of the conflict and the unsettled state of the decisions on both issues. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1944.